

***United States Court of Appeals  
for the Second Circuit***



**AMICUS BRIEF**





77-4182

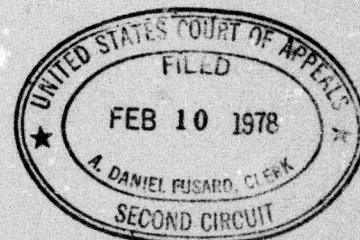
orig

B

PLS

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 77-4182



NATIONAL LABOR RELATIONS BOARD, Petitioner -

and

YESHIVA UNIVERSITY FACULTY ASSOCIATION, Intervenor-Petitioner

v.

YESHIVA UNIVERSITY, Respondent

Brief of the  
AMERICAN ASSOCIATION OF  
UNIVERSITY PROFESSORS  
As Amicus Curiae

ATTORNEY FOR AMICUS CURIAE

Matthew W. Finkin  
Law School  
Duke University  
Durham, North Carolina 27706

OF COUNSEL:

David E. Feller  
Law School  
University of California  
Berkeley, California 94720



IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

No. 77 - 4182

---

NATIONAL LABOR RELATIONS BOARD, Petitioner

and

YESHIVA UNIVERSITY FACULTY ASSOCIATION, Intervenor-Petitioner

v.

YESHIVA UNIVERSITY, Respondent

---

Brief of the  
AMERICAN ASSOCIATION OF  
UNIVERSITY PROFESSORS  
As Amicus Curiae

---

ATTORNEY FOR AMICUS CURIAE

Matthew W. Finkin  
Law School  
Duke University  
Durham, North Carolina 27706

OF COUNSEL:

David E. Feller  
Law School  
University of California  
Berkeley, California 94720

## TABLE OF CONTENTS

|                                                                                                                                                                                                  | PAGE |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| TABLE OF AUTHORITIES                                                                                                                                                                             | 11   |
| INTEREST OF AMICUS                                                                                                                                                                               | 1    |
| SUMMARY OF ARGUMENT                                                                                                                                                                              | 3    |
| INTRODUCTORY                                                                                                                                                                                     | 4    |
| ARGUMENT                                                                                                                                                                                         |      |
| I. University Faculty Are Neither Managerial nor<br>Supervisory Employees Exempt from the Protections<br>of the Labor Act                                                                        | 13   |
| A. The Faculty and Its Representatives Are Not<br>Managerial Employees                                                                                                                           | 13   |
| B. The Faculty and Its Representatives Are Not<br>Supervisors                                                                                                                                    | 22   |
| C. The Inclusion of Faculties as Employees Is<br>Sound as a Matter of Policy                                                                                                                     | 23   |
| D. There Is No Necessary Inconsistency Between<br>Collective Bargaining and Faculty Governance                                                                                                   | 26   |
| II. The Imperative Condition for a Satisfactory<br>Accommodation of Collective Bargaining and<br>Faculty Governance Is the Determination of a<br>Bargaining Unit Congruent with the Core Faculty | 31   |
| A. Department Chairman Are Not Statutory Super-<br>visors Where They Act Primarily in the Interest<br>of Their Colleagues in the Department                                                      | 32   |
| B. Part-Time Teachers Ineligible for Academic Tenure<br>Are Appropriately Excluded                                                                                                               | 37   |
| C. "Terminal" Faculty Are Appropriately Included                                                                                                                                                 | 42   |
| CONCLUSION                                                                                                                                                                                       | 44   |



# TABLE OF AUTHORITIES

|                                                                                                                                    | <u>Page</u>                  |
|------------------------------------------------------------------------------------------------------------------------------------|------------------------------|
| <u>STATUTES</u>                                                                                                                    |                              |
| National Labor Relations Act, Sec. 2(11) .....                                                                                     | 22                           |
| 29 U.S.C. Sec. 152(12)(b) (1970) .....                                                                                             | 17                           |
| <u>CASES</u>                                                                                                                       |                              |
| <u>Bell Aerospace (Textron)</u> (on remand),<br>219 NLRB 384 (1975) .....                                                          | 19                           |
| <u>The Berry Schools</u> ,<br>10-CA-11266-1, 2, 3 (March 11, 1976) .....                                                           | 4                            |
| <u>Bloomfield College Chapter AAUP v. Bloomfield College</u> ,<br>346 A.2 615 (N.J. App. Div. 1975) .....                          | 10                           |
| <u>Fordham University</u> ,<br>193 NLRB 134 (1971) .....                                                                           | 20, 34, 36                   |
| <u>General Dynamics Corp.</u><br>213 NLRB 851 (1974) .....                                                                         | 19, 35                       |
| <u>Int'l Union of Brewery Workers v. NLRB</u> ,<br>298 F.2d 297 (D.C. Cir. 1961), <u>cert. den.</u> , 369<br>U.S. 843 (1962) ..... | 22                           |
| <u>Lumpert v. Univ. of Dubuque</u><br>Iowa Ct. App. 49-2-57568 (April 14, 1977) .....                                              | 10                           |
| <u>NLRB v. Bell Aerospace Co. Division of Textron, Inc.</u><br><u>[Textron]</u> ,<br>416 U.S. 262 (1964) .....                     | 13, 14                       |
| <u>NLRB v. Katz</u><br>369 U.S. 736 (1962) .....                                                                                   | 11                           |
| <u>NLRB v. Master Stevedore's Ass'n</u> ,<br>418 F.2d 297 (D.C. Cir. 1961) .....                                                   | 22                           |
| <u>NLRB v. Wentworth Institute</u> ,<br>515 F.2d 550 (1st Cir. 1975) .....                                                         | 20                           |
| <u>New York University</u> ,<br>205 NLRB 4 (1973)                                                                                  | 20, 31, 34, 35<br>37, 40, 41 |

|                                                                                                                                                                      | <u>Page</u> |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| <u>Ohio Power Co. v. NLRB,</u><br>176 F.2d 385 (6th Cir.), <u>cert. den.</u> , 338 U.S. 899<br>(1949) .....                                                          | 23          |
| <u>Post-Newsweek Station,</u><br>203 NLRB 522 (1973) .....                                                                                                           | 35          |
| <u>Retail Clerks Int'l Ass'n v. NLRB,</u><br>366 F.2d 642 (D.C. Cir. 1966), <u>cert. den.</u> , 386 U.S.<br>1017 (1967) .....                                        | 14          |
| <u>Scheuer v. Creighton University,</u><br>169 Neb. 618 (Dec. 21, 1977) .....                                                                                        | 10          |
| <u>Shaw College,</u><br>232 NLRB No. 33 (1977) .....                                                                                                                 | 4           |
| <u>Skidmore, Owens &amp; Merrill,</u><br>192 NLRB 920 (1971) .....                                                                                                   | 35          |
| <u>State ex rel. Richardson v. Board of Regents,</u><br>70 Nev. 347 (1954) .....                                                                                     | 20          |
| <u>Trustees of Noble Hospital,</u><br>218 NLRB 1441 (1975) .....                                                                                                     | 36          |
| <u>Westinghouse Broadcasting Co. v. NLRB,</u><br>503 F.2d 1055 (2d Cir. 1974) .....                                                                                  | 35          |
| <u>Westinghouse Electric Co.,</u><br>113 NLRB 337 (1955) .....                                                                                                       | 18-19       |
| <u>Wichita Eagle &amp; Beacon Publishing Co. v. NLRB,</u><br>480 F.2d 52 (10th Cir. 1973) .....                                                                      | 19          |
| <br><u>BOOKS AND MONOGRAPHS</u>                                                                                                                                      |             |
| ACADEMIC FREEDOM, in The Reference Shelf, Vol. III, No. 6 (J.<br>Johnson, ed., 1925) .....                                                                           | 5           |
| AMERICAN HIGHER EDUCATION - A DOCUMENTARY HISTORY, PART NINE<br>("University Faculties and University Control"), R. H.<br>Hofstadter and W. Smith, eds., 1961) ..... | 5           |
| J. Baldrige, POWER AND CONFLICT IN THE UNIVERSITY (1971)....                                                                                                         | 16, 34      |
| Bodner, <u>The "No Agent" Vote at N.Y.U.: A Concise Legal</u><br><u>History, ACBIS Special Report #9 (1974)</u> .....                                                | 24          |



|                                                                                                                          | <u>Page</u> |
|--------------------------------------------------------------------------------------------------------------------------|-------------|
| The Carnegie Commission on Higher Education, GOVERNANCE<br>OF HIGHER EDUCATION, A Report and Recommendation (1973) ..    | 11, 21      |
| The Carnegie Council on Policy Studies in Higher Education,<br>FACULTY BARGAINING IN PUBLIC HIGHER EDUCATION (1977)..... | 12, 31      |
| R. Carr & D. Van Eyck, COLLECTIVE BARGAINING COMES TO THE<br>CAMPUS (1973) .....                                         | 36          |
| E. Cheit, THE NEW DEPRESSION IN HIGHER EDUCATION (1971) .....                                                            | 8           |
| L. Epstein, GOVERNING THE UNIVERSITY (1974) .....                                                                        | 32, 33      |
| R. Freeman & D. Breneman, FORECASTING THE Ph.D. LABOR MARKET:<br>PITFALLS FOR POLICY (1974) .....                        | 8           |
| S. Harris, HIGHER EDUCATION: RESOURCES AND FINANCES (1962) ....                                                          | 16          |
| D. Henry, CHALLENGES PAST, CHALLENGES PRESENT: AN ANALYSIS OF<br>AMERICAN HIGHER EDUCATION SINCE 1930 (1973) .....       | 9           |
| R. Hofstadter & W. Metzger, THE DEVELOPMENT OF ACADEMIC<br>FREEDOM AND TENURE IN THE UNITED STATES (1955) .....          | 5           |
| T. Hungate, MANAGEMENT IN HIGHER EDUCATION (1964).....                                                                   | 15          |
| W. Jellema, FROM RED TO BLACK? THE FINANCIAL STATUS OF<br>PRIVATE COLLEGES AND UNIVERSITIES (1973) .....                 | 8           |
| F. Kemerer & J. Baldrige, UNIONS ON CAMPUS (1975)                                                                        | 9, 27       |
| W. Kornhauser, SCIENTISTS IN INDUSTRY (1962) .....                                                                       | 18          |
| D. Leab, A UNION OF INDIVIDUALS: THE FORMATION OF THE NEWSPAPER<br>GUILD 1933-1936 (1970) .....                          | 16          |
| Lussier, <u>Albion College Votes "No Agent": A Case Study,</u><br>ACBIS Special Report #7 (Undated)                      | 24-25       |
| S. Marcson, THE SCIENTIST IN AMERICAN INDUSTRY (1960).....                                                               | 18          |
| H. Mason, COLLEGE AND UNIVERSITY GOVERNMENT (Tulane Studies in<br>Political Science Vol. XIV, 1972).....                 | 15, 33      |
| National Commission on Academic Tenure in Higher Education,<br>FACULTY TENURE: A REPORT AND RECOMMENDATIONS (1973) ..... | 39          |
| REPORT OF THE PRESIDENTIAL COMMISSION ON EDUCATION BEYOND THE<br>HIGH SCHOOL (1957) .....                                | 6           |
| U.S. Office of Education, YEAR BOOK OF HIGHER EDUCATION,<br>1973/74 (1973) .....                                         | 5           |

ARTICLES

|                                                                                                                                                                                   |        |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| Bloustein, <u>A Chamber of Horrors? in THE EFFECTS OF FACULTY COLLECTIVE BARGAINING ON HIGHER EDUCATION</u> , 110 (R. Hewitt, ed., 1973) .....                                    | 26     |
| Bundy, <u>Faculty Power</u> , Atlantic Monthly 42 (Sept. 1968) .....                                                                                                              | 7      |
| The Chronicle of Higher Education, <u>Faculty Unionization: Summary of Bargaining Agents</u> , May 31, 1977, p. 11 .....                                                          | 4      |
| Feller, <u>A General Theory of the Collective Bargaining Agreement</u> , 61 Calif. L.Rev. 663 (1973) .....                                                                        | 16     |
| Finkin, <u>The Arbitration of Faculty Status Disputes in Higher Education</u> , 30 Sw. L.J. 389 (1976) .....                                                                      | 11     |
| Finkin, <u>The NLRB in Higher Education</u> , 5 U. Tol. L.Rev. n. 26 at 617 .....                                                                                                 |        |
| Finkin, <u>The Supervisory Status of Professional Employees</u> , 45 Fordham L. Rev. 805 (1977) .....                                                                             | 17, 36 |
| Friendly, <u>The Federal Administrative Agencies: The Need for Better Definition of Standards</u> , 75 Harv. L. Rev. 863 (1962)..                                                 | 40     |
| Furniss, <u>Faculty Tenure and Contract Systems: Current Practice</u> , American Council on Education Special Report (July 27, 1972)                                              | 6      |
| Gay, <u>The New Yale President's Professors</u> , The New York Times, Dec. 21, 1977).....                                                                                         | 9      |
| Kemeny, <u>The University in Steady State</u> , DAEDALUS (Winter, 1975) 87                                                                                                        | 9      |
| Lesnick, <u>The Labor Board and the Courts of Appeal: A Crisis of Confidence</u> , Proceedings of the New York University Twenty-First Annual Conference on Labor 35 (1969) ..... | 40     |
| Metzger, <u>The American Academic Profession in "Hard Times,"</u> DAEDALUS (Winter 1975) 25 .....                                                                                 | 5, 9   |
| Pollitt & Thompson, <u>Collective Bargaining on the Campus: A Survey Five Years After Cornell</u> , Indus. Rel. L.J. 191 (1976)...                                                | 34     |
| Reiss, <u>Collegiality or Unionization: The Fordham Election in THE EFFECTS OF FACULTY COLLECTIVE BARGAINING ON HIGHER EDUCATION</u> 37 (R. Hewitt, ed. 1973) .....               | 24, 25 |
| Sorensen & Sorensen, <u>The Conflict of Professionalism in Bureaucratic Organization</u> , 19 Admin.Science Q. 98 (1974).....                                                     | 18     |



|                                                                                                                                                                                                   | <u>Page</u> |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| <br><u>AAUP DOCUMENTS AND ARTICLES</u>                                                                                                                                                            |             |
| 1940 <u>Statement of Principles on Academic Freedom and Tenure</u> ....                                                                                                                           | 1, 5        |
| <u>Statement on Government of Colleges and Universities</u> .....                                                                                                                                 | 7           |
| <br>Clark, <u>Faculty Authority</u> , 47 AAUP Bull. 293 (1961).....                                                                                                                               | 15          |
| Dorfman, <u>Report on the Economic Status of the Profession</u> ,<br>1976-1977, 63 AAUP Bull. 146 (1977) .....                                                                                    | 8           |
| <u>Role of the Faculty in Budgetary and Salary Matters</u> , 62 AAUP<br>Bull. 379 (1976) .....                                                                                                    | 9           |
| <u>Report of Committee Z on the Economic Status of the Profession</u> ,<br>45, 57 AAUP Bull. (1959, 1971) .....                                                                                   | 6           |
| <br><u>MISCELLANEOUS</u>                                                                                                                                                                          |             |
| S. Rep. No. 105, 80th Cong., 1st Sess. 1 (1947) .....                                                                                                                                             | 16, 22      |
| H.R. Rep. No. 510, 80th Cong., 1st Sess. at 36 (1947).....                                                                                                                                        | 17          |
| S. Rep. No. 766, 93rd Cong., 2d Sess. 6 (1974) .....                                                                                                                                              | 18          |
| <u>Agreement Between Bloomfield College and the Bloomfield College<br/>Chapter of AAUP (1975-1977)</u> .....                                                                                      | 27          |
| <u>Agreement Between the Administration of St. John's University<br/>and the St. John's Chapter of the AAUP-FA (1974-1977)</u> .....                                                              | 28--29      |
| <u>Master Agreement of the Buffalo Philharmonic 1976-1977</u> .....                                                                                                                               | 21-22       |
| <u>Master Agreement of the Milwaukee Symphony Orch. 1974-1977</u> .....                                                                                                                           | 21          |
| <u>Master Agreement of the National Symphony, 1973</u> .....                                                                                                                                      | 22          |
| <br>Statement of the Committee of Interns and Resident on S. 794 Before<br>the Subcommittee on Labor of the Senate Committee on Labor and<br>Public Welfare, 93d Cong., 1st Sess. 296 (1973)..... | 17-18       |
| <br>Statement of the American Nurses' Ass'n on S.794 Before the<br>Subcommittee on Labor of the Senate Committee on Labor and<br>Public Welfare, 93d Cong., 1st Sess. 122 (1973).....             | 18          |

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

No. 77 - 4182

---

NATIONAL LABOR RELATIONS BOARD, Petitioner

and

YESHIVA UNIVERSITY FACULTY ASSOCIATION, Intervenor-Petitioner

v.

YESHIVA UNIVERSITY, Respondent

---

Brief of the  
AMERICAN ASSOCIATION OF  
UNIVERSITY PROFESSORS

As Amicus Curiae

---

INTEREST OF AMICUS

The American Association of University Professors (AAUP) was founded in 1915 to advance the standards, ideals and welfare of college and university teachers and researchers. Since its inception it has sought, often jointly with other organizations, to establish standards of good institutional practice. Paramount among these is the 1940 Statement of Principles on Academic Freedom and Tenure, drafted jointly with the Association of American Colleges (AAC) and currently endorsed by 104 educational associations and disciplinary societies.



In 1970 the National Labor Relations Board (NLRB) extended jurisdiction to private, non-profit colleges and universities. That development has been paralleled by the growth of public employment bargaining laws in over twenty states extending collective bargaining rights to the faculties of state-operated institutions of higher education. The Association realized that the resort to collective bargaining might place at risk the principles of academic freedom, tenure and faculty governance that the AAUP had long maintained. Accordingly, it sought to minimize that risk by assuring that state and NLRB decisions take account of those features of higher education that distinguish it from industrial employment. The AAUP filed a petition for rule-making with the NLRB on June 18, 1971 urging the Board to anticipate many of the issues it would confront (including several of those presented here). Further, the Association adopted a policy that permits its local affiliates to engage in collective bargaining for their faculties. The AAUP has been the principal faculty participant before the Board in its proceedings to determine appropriate faculty bargaining units. At the current time, 15 Association Chapters in the private sector have been selected by their faculties as bargaining representatives.

Because of its long-standing commitment to basic academic standards and because of its acute awareness of the practical problems that arise in faculty collective bargaining, the AAUP believes it is uniquely situated to address this Court as Amicus Curiae.

### SUMMARY OF ARGUMENT

In the past eight years the NLRB has developed a set of well-defined rules governing the determination of an appropriate bargaining unit for college and university faculty. The Board applied those rules in the instant case. Thus the question presented is whether the Board's refinements are consistent with the Act.

The Board's approach rests upon what the prestigious Carnegie Council on Policy Studies in Higher Education termed the "'imperative' condition" for reconciling collective bargaining with the decision-making structure of institutions of higher education -- that the bargaining unit should be co-extensive with the core faculty. Those whose interests are peripheral to the core faculty should be excluded from the bargaining unit and those who are looked upon by the core faculty as its leaders and representatives should be included in the bargaining unit. Only in this way will the educational implications of the bargain struck reflect the undiluted and undiminished assessment of those who have made the institution the primary focus of their professional careers.

Accordingly, amicus AAUP will show that the Board's well-developed law is not only consistent with the Act but is essential to the satisfactory accommodation of collective bargaining to the academic milieu.



## INTRODUCTORY

The NLRB extended jurisdiction to private colleges and universities in 1970, in response to a petition from the administration of Cornell University. Since that time, the faculties of 64 private four-year colleges, universities and professional schools have selected collective representatives. Faculty Unionization: Summary of bargaining agents, The Chronicle of Higher Education, May 31, 1977, p. 11. The faculties of another 39 institutions have voted against collective representation. Id.

These modest figures alone do not reveal the full impact of the extension of the Act to higher education.<sup>1/</sup> The fact that professors are even seriously considering collective bargaining indicates the widespread existence of critical problems in faculty-administration relations. Accordingly, before treating the precise questions presented by the instant case, this Introductory discusses why many faculty consider collective bargaining a necessary measure.

Unlike the archetypical professions of law and medicine, practiced traditionally by independent contractors, the academic profession is practiced entirely in the setting of institutional employment; thus, the

---

<sup>1/</sup> A remedy is now readily available for faculty terminated for engaging in concerted activity for mutual aid and protection. See, e.g., The Berry Schools, 10 - CA - 11266 - 1,2,3 (March 11, 1976)(college violates section 8 (a)(1) in denying promotion to leaders of the Faculty Council who sought to secure wage increases for the faculty), and Shaw College, 232 NLRB No. 33 (1977)(college violates section 8(a)(3) in termination of faculty member for engaging in organizational activity). But far more important, the modest growth of collective bargaining does not indicate the effects the mere availability of collective bargaining has had upon the administrators of "unorganized" institutions. See Section I(c), infra.

academic profession's demands for autonomy for expression not in requirements for practitioner control of accreditation and licensing, but in special institutional accommodations: a right to academic freedom, a system of academic tenure, and a role in educational decision-making. See generally, 2 AMERICAN HIGHER EDUCATION - A DOCUMENTARY HISTORY, PART NINE ("University Faculties and University Control") (R. Hofstadter & W. Smith eds., 1961). Initially, these demands were strongly opposed by many college and university presidents and trustees. R. Hofstadter & W. Metzger, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 468-485 (1955). See also the selection of sources in The Reference Shelf, Vol. III No. 6, ACADEMIC FREEDOM 83-110 (J. Johnsen ed. 1925). A committee of the Association of American Colleges (AAC) replied to the 1915 Declaration of Principles that "No way has yet been found to play the cello or the harp and at the same time to direct the orchestra." Id. at 85. In the ensuing decades, the faculty's efforts to achieve its goals were hindered by the Depression, war, economic recession, and attacks on intellectual freedom in the name of national security. From the 50s and through the 60s, however, higher education enjoyed unprecedented support. Fueled by federal programs, expanding state assistance, and the economy's demands for more highly trained personnel, higher education grew exponentially -- to 2,606 institutions in 1971. U.S. Office of Education, Year Book of Higher Education 1973/1974 Table 19, p. 497 (1973). Enrollment grew to almost nine million in 1971. Id. The academic labor force grew from 82,000 (full and part-time) in 1930 to 574,000 in 1970. Metzger, The American Academic Profession in "Hard Times," DAEDALUS (Winter 1975) 25, 37.



Growth was accompanied by personal as well as institutional prosperity. In 1957, national attention was focused by the Report of the Presidential Commission on Education Beyond the High School on the economic plight of the American professoriate -- not simply in human terms but as a matter of national priority in the development of human resources. The Commission urged that faculty compensation be competitive with professional employment generally; only in this way could universities attract and retain faculty of the highest quality. The Commission noted that

To restore teaching to a competitive position in the professional labor market comparable to that which it occupied before World War II would require an average increase in faculty salaries of something like 75 to 80 percent. And to maintain this position, once restored, would probably require by 1970 an average rise of 100 to 125 percent above present faculty salary levels. Id. at 6.

By 1970, the average of faculty salary of all ranks combined was 110 percent of the average in 1957; thus, at least nominally, much of the Commission's initial goal was achieved. See Report of Committee Z on the Economic Status of the Profession, 45, 57 AAUP Bull. (1959, 1971).

As a related development, the profession began to enjoy increasingly widespread institutional acceptance of its demands for academic freedom and tenure. The 1940 Statement of Principles on Academic Freedom and Tenure, drafted jointly by the AAC and AAUP, came to be endorsed by more than 100 educational organizations and disciplinary societies. An institutional survey conducted by the American Council on Education in 1972 revealed almost uniform adherence to those AAUP standards. Furniss, Faculty Tenure and Contract Systems: Current Practice, A.C.E. Special Report (July 27, 1972).

A substantial advance in achieving widespread acceptance of the faculty's role in institutional governance occurred in 1966 when, after nine years of negotiation, the three paramount national organizations of institutions, trustees and faculty -- the American Council on Education, the Association of Governing Boards of Universities and Colleges, and the AAUP--agreed to



the text of a Statement on Government of Colleges and Universities that recognized the faculty's right to a consultative role in administrative decision-making and a primary role in all matters of educational policy, including the selection and retention of faculty members. While the Statement on Government represented an ideal, far from uniformly observed, it reflected a growing recognition of the faculty's prerogatives in educational affairs. This shift over the years from outright administrative resistance to such claims was attributed by McGeorge Bundy, then Dean of Faculty at Harvard, not only to the increased prestige attached to men of learning since World War II but to the "massive authority of the law of supply and demand" as well. Bundy, Faculty Power, Atlantic Monthly (Sept. 1968) at 42.

By the early 70s, however, faculties encountered an accelerating reversal in their circumstances akin to the experience in the Depression<sup>2/</sup>--

---

<sup>2/</sup> The former President of the University of Illinois has summarized the impact of the Depression upon the professoriate:

Related to the [economic] disquiet of many faculties was the feeling that collectively they did not have sufficient opportunity to be involved in administrative decision-making. Faculties were deprived of first-hand information about many institutional conditions and problems, and they often did not have a systematic way to make known their views on such pending issues as were apparent. Faculty involvement in educational decisions had become common before 1930. But with notable exceptions, this participation in governance did not reach into financial affairs or administrative organization. From the nature of the situation, institutional policies were often inadequate or wrong. The fact that faculties were not consulted as much as they desired magnified the ill-effects of error. Hostilities developed, some hidden, and morale was weakened by what faculty members thought were blunders or unfair manipulations.

Faculty-administration disharmony was not born in the Depression, but the stress of the period undoubtedly deepened the divisions. This was inevitable when administrative decisions were having such highly charged direct effect upon home, family, status, and sense of security. There is no evidence that the unhappiness led to much concerted action at the time. But the atmosphere was not dissipated, even in the recovery years. . . .

AMERICAN HIGHER EDUCATION SINCE 1930, 18-19 (1973)



an analogy that the title of a leading study was quick to draw. E. Cheit, *THE NEW DEPRESSION IN HIGHER EDUCATION* (1971). See also W. Jellema, *FROM RED TO BLACK? THE FINANCIAL STATUS OF PRIVATE COLLEGES AND UNIVERSITIES* (1973). As a result of the declining fortunes of American colleges and universities, the faculty's economic well-being actually lost ground both in absolute terms and in comparison with workers in general. Robert Dorfman, Professor of Economics at Harvard, explains:

From 1966-67 to 1972-73, average real [faculty] compensation rose, by about 1.6 per cent a year, to a peak of \$12,900 in terms of 1967-68 dollars. Since then, it has fallen back, at an average of nearly 2 per cent a year, until we are just about where we were ten years ago. Looking at salary, purchasing power of faculty members has actually diminished by over five per cent in the course of the last decade. . .

Wage and salary employees in other industries have done better. . . . Until 1970-71, faculty salaries approximately kept pace with the increase in salaries of workers in general. Since then, they have fallen steadily behind. The average salary of all nonagricultural employees has risen 48 per cent since 1970-71; that of faculty members only 70 per cent as much. The performance of compensation (salary plus fringes) has been about the same: the national average level of compensation has increased by 36 per cent more than that of faculty members since the beginning of the seventies.

The consequence of these trends in real terms. . . is evident. The increase in monetary compensation is largely illusory for both faculty members and employees in general. Still, in purchasing power terms, the average employee's compensation is worth 5.5 per cent less. Dorfman, Report on the Economic Status of the Profession 1976-1977, 63 AAUP Bull. 146, 148-149 (1977) (references to illustrative tables omitted) (emphasis in original).

Further, a "steady" or no-growth state of higher education has been reliably projected as a chronic condition to be accompanied by a substantial oversupply of new doctoral degree holders well into the 1990s. See generally R. Freeman & D. Breneman, *FORECASTING THE Ph.D. LABOR MARKET: PITFALLS FOR POLICY* (1974). This projection has resulted in administrative efforts to modify tenure and to take other steps to deal with financial problems that exacerbate faculty-administration relations.



F. Kemerer & J. Baldrige, UNIONS ON CAMPUS Ch. 3 (1975) ("Causes of Faculty Unionization"). See also Metzger, The American Academic Profession in "Hard Times," DAEDALUS (Winter 1975) 25, and Kemeny, "The University in Steady State," id. at 87.

The strategies for reducing expenditures used today "are not very different from the approaches in the thirties." D. Henry, CHALLENGES PAST, CHALLENGES PRESENT, supra at 20. Thus, administrations have enlarged class size, rearranged courses, postponed or denied all paid leaves of absence, omitted renewal or nonrenewal of annual appointments, reduced expenditures for research, and eliminated or reduced extra pay for summer sessions, laboratories or demonstration lectures. Some administrations, moreover, have frozen hiring or promotions, imposed tenure "quotas," abolished programs or entire academic departments, and, in some instances, terminated tenured faculty of long service without even a semblance of consultation with the faculty.

As administrators take even the less severe steps outlined by President Henry, the quality and content of the education offered as well as the faculty's livelihood and working conditions are seriously affected; thus, as in the 30s, conditions of scarcity have given rise to increased faculty demands for participation in financial decisions. See, e.g., The Role of the Faculty in Budgetary and Salary Matters, 62 AAUP Bull. 379 (1976). But the "buyers'" labor market has lessened the impact of the faculty's influence on many campuses, even the most elite.<sup>3/</sup>

---

<sup>3/</sup> It is of more than anecdotal significance that the designation of a new President at Yale was greeted by an essay in the New York Times by a prominent faculty member lamenting the loss of faculty influence. Gay, The New Yale President's Professors, The New York Times, Dec. 21, 1977, p. 31 cols. 3-5. Professor Gay wrote in pertinent part:

(continued)



It is against this background that faculty members in many private institutions assess the future: the market for their services is sluggish or diminishing, their financial security is eroding, the system of tenure that protects their academic freedom as well as their job security is under pressure if not attack, their effective influence in institutional decisions that will govern their professional lives is waning or insecure, and the degree to which the courts will require administrations to abide by faculty governance procedures or scrutinize carefully unilateral administrative decisions that could devastate their careers is, at best, uncertain.<sup>4/</sup> It is in this context that faculty consider the merits of collective bargaining.

The promise held by the Act for the amelioration of these conditions rests upon two major elements of federal labor policy. The first is the duty to bargain. No faculty responsibly expects collective bargaining to produce net economic "gains" out of an admittedly limited budget without affecting the institution's curriculum, workload and staffing. The fact is, however, that decisions balancing these considerations are being made and that many

---

3/ cont.

[A]s the fat 60's faded into the lean 70's . . . . [t]he old sense of community has all but disappeared. . . . It is not that the Yale faculty has been consulted and found wanting; it is that our administrators have not wanted to consult us.

\* \* \* \*

However much we like and trust [President-designate] Bart Giamatti, he will have to reason with a faculty near the end of its patience. The professors are ready to claim full consultation on the issues that affect them.

4/ Compare Bloomfield College Chapter AAUP v. Bloomfield College, 346 A.2d 615 (N.J. App. Div. 1975) with Lumpert v. University of Dubuque, Iowa Ct. App. 49-2-57568 (April 14, 1977) and Scheuer v. Creighton University, 169 Neb. 618 (Dec. 21, 1977).

faculties, while bearing the brunt of these decisions, have no sense that they have participated effectively in making them. The administration's obligation to bargain in good faith requires that it not act unilaterally upon mandatory bargaining subjects, including matters of compensation, workload and lay-off, without first exhausting the mediating influence of attempting to achieve agreement with the faculty. See NLRB v. Katz, 369 U.S. 736 (1962). Thus federal labor policy coincides, in part, with what would otherwise be a principle of good institutional governance.

Second, the terms agreed upon, including, for example, provisions insuring the faculty's role in governance, are enforceable under section 301 of the Act. Whether or not the administration will involve the faculty in making critical decisions, as provided for in the institution's own internal regulatory machinery, may no longer remain a matter of the faculty's ad hoc political influence within the institution or the happenstance of finding a state judge willing to compel such adherence in the exercise of the court's equity power. Here as well, the federal policy of stability in labor relations embodied in section 301 also coincides with principles of good academic governance and reinforces the faculty's sensed need for security in its institutional role.<sup>5/</sup>

The Carnegie Commission on Higher Education considered the alternative posed by collective bargaining in its study, GOVERNANCE OF HIGHER EDUCATION. A Report and Recommendation of the Carnegie Commission on Higher Education (1973). Notably, the Commission urged that, "[F]aculty should have the right

---

<sup>5/</sup> In the majority of cases, disputes over governance requirements contained in a collective agreement, or incorporated by it, would be submitted to arbitration -- frequently before arbitrators who are themselves experienced academics. These have included Thomas Christensen, Thomas Kennedy, Jacob Hyman, Robert Stutz, Russell Smith, Clyde Summers, and Archibald Cox. See the awards noted in Finkin, The Arbitration of Faculty Status Disputes in Higher Education, 30 Sw. L.J. 389 (1976).



to organize and to bargain collectively, if they so desire, in both public and private institutions." Id. at 43. More recently, the successor, Carnegie Council on Policy Studies in Higher Education<sup>6/</sup> reconsidered the question in light of independent studies commissioned by it, and reaffirmed its predecessor's position. FACULTY BARGAINING IN PUBLIC HIGHER EDUCATION, A Report of the Carnegie Council on Policy Studies in Higher Education 2 (1977). These reports explicitly endorse the professor's right to participate significantly in the government of employing institutions; but they also recognize that in the absence of a radical change in the financing of higher education and in the labor market, collective bargaining may be the only means available for some faculties to secure or maintain an effective voice in their economic and academic future.

---

<sup>6/</sup> The Carnegie Commission was chaired by Clark Kerr, former President of the University of California, and consisted of eighteen members including the President of Notre Dame University, the President of the University of North Carolina, the former President of Harvard University, the Director of the Institute of Advanced Study at Princeton, and other academics, lawyers and businessmen. The successor Carnegie Council is also chaired by Clark Kerr. It consists of twelve additional members -- four college and university presidents, four professors, and four members representing other educational interests.

## ARGUMENT

### I. UNIVERSITY FACULTY ARE NEITHER MANAGERIAL NOR SUPERVISORY EMPLOYEES EXEMPT FROM THE PROTECTIONS OF THE LABOR ACT

The administration of Yeshiva University has argued that the Board should exempt the entire faculty of the University, or alternatively, members of the faculty, from the coverage of the Act because they are managerial or supervisory employees. The administration's argument is based upon two assertions. First, "the Act was not designed to be imposed on such a matrix of shared authority." Employer's Post Hearing Brief in Yeshiva University at 51. From the valid assumption that Congress did not contemplate the special features of colleges and universities in fashioning the Act, it is argued that the Board lacks authority under the Act to distinguish faculty members from industrial managers and supervisors. Id. at 43. Second, "the imposition of faculty collective bargaining would have potentially disastrous consequences for the structure of shared management," that is, to the system of faculty participation in institutional governance. Id. at 50. Neither assertion withstands scrutiny. AAUP will show that the Board's approach is fully consistent with the Act and that collective bargaining is not inconsistent with basic principles of institutional governance.

A. The Faculty and Its Representatives Are Not Managerial Employees

In NLRB v. Bell Aerospace Co. Division of Textron, Inc. [Textron], 416 U.S. 262 (1974), the Court held that all managerial employees were excluded from the Act. In so doing the Court approved the tests of managerial status, previously developed by the Board and approved by the courts: managers



are those employees whose interests are "more closely identified" or "closely aligned" with management, and those who "formulate and effectuate management policies." See also Retail Clerks Int'l Ass'n v. NLRB, 366 F.2d 642, 645 (D.C. Cir. 1966) (per Burger, J.), cert. den., 386 U.S. 1017 (1967). In remanding the case for a determination of managerial status, the Court supplied further guidance, "[T]he question whether particular employees are 'managerial' must be assessed in terms of the employees' actual job responsibilities, authority, and relationship to management." NLRB v. Bell Aerospace, supra n. 17 at 290. (emphasis added). It is clear from the Court's analysis that the managerial exemption, like the statutory supervisory exemption, is founded upon management's right to have its managers and supervisors accountable solely to it and not to have their loyalty divided with a union.

Clearly, the faculty is not "aligned" with management--understood as the board of trustees and officers of administration. In a great many institutions, however, it is equally clear that the faculty does effectively determine basic educational policies such as the curriculum, degree requirements, admissions and the like. Accordingly, it is by analogizing faculty formulation of educational policy to the industrial context--determining what the product will be (degree requirements), how it will be produced (curriculum and teaching methods) and with what raw materials (admission)--that the administration of Yeshiva asserts that the faculty is management. Employer's Post Hearing Brief, supra at 44-45.

The analogy misapprehends the functions of faculty governance and the faculty's "relationship to management" in the performance of those functions. Faculty participation in the formulation of educational policy is premised

first upon the faculty's presumptive professional expertise. As the former Controller of Teachers College, Columbia University, observed, "The board [of trustees] in fulfilling its responsibilities for management, requires the aid of the faculty . . . because the board does not, unaided, possess the best judgment on all matters involved." T. Hungate, MANAGEMENT IN HIGHER EDUCATION 66-67 (1964). Similarly, a leading study of governance points out that

Decision-making in the university must involve the teacher-researcher "on the assembly line" because he chiefly knows intimately what the "production" of the university is all about; it is his immediate proximity to the personal tensions of learning and scholarly creation which give legitimacy to much of the decision-making for the academic community. H. Mason, COLLEGE AND UNIVERSITY GOVERNMENT 1 (Tulane Studies in Political Science, Vol. XIV, 1972).

Second, as Mason also makes clear, faculty do not view unilateral pronouncements by the Board or administration as legitimate if they are announced ex cathedra without prior faculty consultation. The successful operation of a university requires the full cooperation and support of the faculty; in fact, it is the very demoralization of the faculty occasioned by a pattern of unilateral administrative conduct that has militated toward the use of collective bargaining. Introductory, supra.

Finally, the faculty's participation has long been viewed as a safeguard for academic freedom, as a bulwark against the intrusion of an aprofessional judgment on matters that the faculty considers its professional prerogative. Clark, Faculty Authority, 47 AAUP Bull. 293 (1961). As the economist Seymour Harris points out, "They [the faculty] do not accept orders from the administration on such matters as curriculum or the choice of faculty. If they



did, the universities would soon lose their freedom and the uninhibited search for knowledge." S. Harris, HIGHER EDUCATION: RESOURCES AND FINANCES 632 (1962).

From this perspective it is quite clear that the faculty's role in institutional decision-making represents an accommodation by employing institutions to the demands of employed professionals for a degree of independence in professional practice.<sup>7/</sup> The various faculty senates, councils, and committees are devices whereby the faculty's independent professional judgment are brought to bear upon the institution's managerial hierarchy. J. Baldrige, POWER AND CONFLICT IN THE UNIVERSITY 114 (1971).<sup>8/</sup>

This analysis is further supported by the legislative history of the closely related statutory policy of exempting supervisors under the theory that they are "traditionally regarded as part of management." S. Rep. No. 105, 80th Cong., 1st Sess. 3 (1947). At the same time that Congress considered these supervisory exemptions, Congress also responded to the urging of unions representing professional employees and allowed professionals to be organized in presumptively separate bargaining units. It did so despite the urging of some management representatives that professionals ought also

---

<sup>7/</sup> An analogy would be to the guild tradition in certain highly skilled trades where unions have insisted that they rather than management should establish work rules. See generally Feller, A General Theory of the Collective Bargaining Agreement, 61 Calif. L. Rev. 663, 724-736 (1973). For example, an early constitution of the Newspaper Guild provided that Guild contracts where possible should provide that "no editorial employee shall be dismissed except for gross incompetence as decided by the guild grievance committee or except proof satisfactory to the . . . committee with need for retrenchment." D. Leab, A UNION OF INDIVIDUALS: THE FORMATION OF THE NEWSPAPER GUILD 1933-1936 at 272 (1970). See also Section I(D), infra.

<sup>8/</sup> For this reason it would be anomalous to hold the faculty to be non-managerial but exempt the members of such committees as being managerial when they merely express the faculty's views.

be viewed as necessarily part of management and the suggestion of at least two Senators that professional employees ought to be exempt if supervisors were to be exempt.<sup>9/</sup>

These dual directives engender a considerable degree of tension. Professional work is often performed by work groups or teams. This was recognized explicitly in the definition of a professional under section 2(12), as including not only the fully fledged professional but junior professionals working "under the supervision of a professional." 29 U.S.C. Sec. 152(12)(b) (1970) (emphasis added). Yet the performance of such explicitly supervisory work by a senior professional (which would presumably include effective evaluation as well as responsible direction) does not render the senior professional a supervisor inasmuch as his determinations are based upon the exercise of professional judgment. As the Conference report made clear, the definition of a professional "covers such persons as legal, engineering, scientific and medical personnel together with their junior professional assistants." H.R. Rep. No. 510, 80th Cong., 1st Sess. at 36 (1947).

Moreover, in fashioning the health care amendments in 1974 Congress confronted the arguments of organized physicians and nurses that a special amendment was needed to assure that leaders of health care teams not be separated from their colleagues as statutory supervisors. Congressional attention was drawn explicitly to the Board's decision concerning department chairmen. Statement of the Committee of Interns and Residents on S. 794

---

<sup>9/</sup> The legislative history is treated in Finkin, The Supervisory Status of Professional Employees, 45 Fordham L. Rev. 805 (1977).



Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 93rd Cong., 1st Sess. 296 (1973); Statement of the American Nurses' Ass'n, id. at 122. The Senate Committee rejected the proposed amendment as "unnecessary because of existing Board decisions." S. Rep. No. 766, 93rd Cong., 2d Sess. 6 (1974) (emphasis added).

In sum, Congress delegated to the Labor Board the task of resolving the overlapping directives exempting supervisors and including professionals (albeit in separate bargaining units); in 1974, Congress renewed that delegation with an expression of continued confidence in the Board's ability to devise sound standards on the basis of nascent case law, including that in higher education. It is no easy task. All professions seek autonomy from non-professional control in the performance of their work and in the manner of their supervision, and, subject to the constraints of the labor market, employing businesses must often accommodate the professional's demands. See, e.g., S. Marcson, THE SCIENTIST IN AMERICAN INDUSTRY 133 (1960), W. Kornhauser, SCIENTISTS IN INDUSTRY 201-202 (1962), Sorensen & Sorensen, The Conflict of Professionals in Bureaucratic Organizations, 19 Admin. Science Q. 98 (1974). In fact, one of the reasons Congress placed professionals in presumptively separate bargaining units was to recognize a separate community of interests "in maintaining certain professional standards." S. Rep. No. 105, supra at 11.

Accordingly, it is important to note that the exercise of judgment by employed professionals on matters that trench upon management decision-making is common in industry and has not resulted in managerial status. For example, in Westinghouse Electric Co., 113 NLRB 337, 339-340 (1955), the Board observed:

While manufacturing engineers make recommendations on matters which are of great importance to management, that factor is usually present in the work of all professional employees, and does not in and of itself make them part of management so as to preclude their inclusion in a professional unit. Indeed, this common factor, in our opinion, was one of the reasons why Congress specifically provided for the establishment of separate professional units. (citations omitted).

More recently in General Dynamics, 213 NLRB 851, 857-858 (1974), the Board, relying upon the Supreme Court's approval of its antecedent law in Textron, made it clear that

Work which is based on professional competence necessarily involves a constant exercise of discretion and judgment, else professionalism would not be involved. Nevertheless, . . . managerial authority is not vested in professional employees merely by virtue of their professional status, or because work performed in that status may have a bearing on company direction.

See also the Board's analysis in Textron on remand, Bell Aerospace, 219 NLRB 384 (1975), referencing General Dynamics, n.9 at 385.

As in industrial cases, the faculty's authority to recommend policy is simply an aspect of its professional status and does not render it managerial. For example, a law faculty, as distinct from the institution's administration or governing board, has professional expertise in the education of lawyers; thus, the law faculty would be expected to have an important role in devising the curriculum, setting standards for graduation, selecting its own members, and the like. Moreover, the tests of managerial status assume that the employee is functioning for management; the exemption is founded upon the policy of not having that control divided. See, e.g., Wichita Eagle & Beacon Publishing Co. v. NLRB, 480 F.2d 52 (10th Cir. 1973). This is what the Supreme Court meant in Textron when it identified the employee's "relation-



ship to management" as an element of determining managerial status. But the nature of professional work is that that professional is independent of such control by management. Management may assign a problem to an industrial research scientist, but management can scarcely dictate what solution the scientist will find. In the college and university setting faculties have achieved a right to recommend educational policies independent of control by management.<sup>10/</sup> While, for example, the governing board has the legal authority to reject a faculty's recommendation that a course of study be offered or a faculty's recommendation that a candidate be given tenure, it may not dismiss faculty members for having made those recommendations. Similarly, public criticism of the administration would not be in breach of the undivided loyalty owed by a subordinate manager to higher authority, but speech protected by academic freedom. See, e.g., State ex rel. Richardson v. Board of Regents, 70 Nev. 347, 269 P.2d 265 (1954). Thus faculty members cannot be considered "managerial" in the sense the Act requires.

Accordingly, the Board has consistently rejected the assertion of university administrations that the entire faculty, or bodies representative of the faculty, should be exempt from the Act as managerial employees. See especially Fordham University, 193 NLRB 134 (1971) and 195 NLRB 639 (1972). To be sure, one could attempt to draw a line, as the administration of New York University urged, between institutions where the faculty have little or no voice and institutions where the faculty have a more effective voice. Cf. NLRB v. Wentworth Institute, 515 F.2d 550, 557-58 (1st Cir. 1975). But the Board, rightly, rejected the argument. New York University, 205 NLRB 4 (1973). Wholly apart from the fineness of the lines the Board would be compelled to draw in determin-

---

<sup>10/</sup> The independence of the faculty from managerial control provided the basis for New York University's assertion that faculty were exempt from the Act as "independent contractors." New York University, 205 NLRB 4, 5 (1973).



ing just how much influence would be "enough,"<sup>11/</sup> and the resulting burdens of unpredictability, litigation, and delay, the result would be a reductio ad absurdum. The relatively uninfluential faculty would surely seek provisions by collective agreement to give it a stronger, more influential role in setting educational policy akin to that performed by more influential faculties. See F. Kemerer & J. Baldrige, UNIONS ON CAMPUS (1975) (reporting an increase in faculty participation in governance on "organized" campuses). Securing that role by collective agreement would not render those faculties "managerial."<sup>12/</sup> As the the Introductory made clear, collective bargaining represents an addition to existing informal collective efforts by the faculty to secure concessions from institutional management to the faculty's professional independence. As the Carnegie Commission explained:

Faculty members, at least in the more prestigious academic institutions, have long engaged in informal and discrete bargaining with administrators, individually or through their faculty committees. But faculty members, even in these institutions, are now under greater pressures than before. . . . They are on the defensive. And some of them are organizing or considering organizing to defend themselves in a suddenly more hostile world and in a society where organized groups surround them. Unionization for them is more a protective than an aggressive act, more an effort to preserve the status quo than to achieve a new position of influence and affluence as has so often been the goal of unionization for other groups in earlier time. GOVERNANCE OF HIGHER EDUCATION, supra at 40.

---

<sup>11/</sup> The distinction drawn by the NYU administration, between the "faculty dominated" institution and all others, was the faculty's sense that it influences "very strongly those elements of the operation of the university that they consider important. . . ." Transcript quoted in Finkin, The NLRB in Higher Education, 5 U. Tol. L.Rev. 508, n.26 at 617 (1974). Inasmuch as a faculty that believes it already effectively dominates the institution is unlikely to sense a need for collective bargaining, exempting such faculties would deny access to the most convenient device for testing that sentiment--a representation election.

<sup>12/</sup> Symphonic musicians, for example, have negotiated for player control of contested decisions on renewal, tenure, discharges and demotion that turn upon an individual's musical competence. Master Agreement of the Milwaukee Symphony Orch. 1974-1977 §10.5 (tenured musician may have Music Director's dismissal order reviewed by a play committee whose decision is final and binding), Master Agreement of the Buffalo Philharmonic 1976-1977 Art. IX(D)

(continued)



Thus, the relatively more influential faculty that had already secured a role by prior institutional concessions would be denied the effective means to protect that role from erosion. Such a result would rest upon no sensible distinction.

B. The Faculty and Its Representatives Are Not Supervisors

At many institutions the faculty collectively makes effective recommendations on all matters of faculty status -- initial appointment, reappointment, and tenure. Dismissal customarily requires a hearing before a faculty body advisory to the governing board. Not infrequently, the faculty has a grievance committee to entertain complaints of unfair treatment from members of the faculty. All these functions could be said to fall within the criteria for supervisory status contained in section 2(11) of the Act.<sup>12/</sup>

However, in order to be deemed a supervisor the employee must not only possess authority over the statutorily enumerated criteria but must exercise it "in the interest of the employer." See, e.g., NLRB v. Master Stevedores Assn., 418 F.2d 140 (5th Cir. 1969); Int'l Union of Brewery Workers v. NLRB, 298 F.2d 297 (D.C. Cir. 1961), cert. den., 369 U.S. 843 (1962). The policy embodied in the statutory exemption of supervisors is management's right to have its supervisors "traditionally regarded as part of management" not subject to "organizations composed of or subservient to the unions of the very men they were hired to supervise." S. Rep. No. 105, 80th Cong., 1st Sess., 1 (1947).

---

<sup>12/</sup> cont.

(Auditioning Committee's Control of Reseating and Non-Renewal), Master Agreement of the National Symphony 1973 §6.05 (Player's Committee review of dismissal and demotion based upon musical deficiency).

<sup>13/</sup> Sec. 2(11) reads:

The term "supervisory" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection

(continued)



For the same reasons outlined in Section I(A), supra, it is clear that the entire faculty (and its representatives) are not statutory supervisors. Administrators and trustees cannot collectively presume to determine whether a particular professor of chemistry, history, literature or law meets standards of academic excellence without the significant involvement of faculty within the discipline who are most familiar with the candidate's performance and promise as teacher and scholar. Thus the involvement of the faculty is a concession by management to the faculty's professional status. By the same token, "management" cannot presume to dictate to the disciplinary peer group what it will recommend in particular cases; the faculty's independence from managerial control in exercising its professional judgment negates any assertion that it is acting for (and thus is accountable to) higher authority -- an essential test for the supervisory status. Ohio Power Co. v. NLRB, 176 F.2d 385, 387 (6th Cir.), cert. den., 338 U.S. 899 (1949).

C. The Inclusion of Faculties as Employees Is Sound as a Matter of Policy

Acceptance of the Administration's argument would not rest upon any sound policy. Of all employees of the institution, including other professional employees, only the faculty would be denied the right to organize and to engage in concerted activity for mutual aid or protection. In view of diminished labor market constraints upon institutions, outlined in the Introductory, the result would be to disadvantage faculties relative to the institution's blue and white-collar employees and non-faculty professionals; to the extent those employees secure economic concessions in collective bargaining the funds remaining available to the institution for faculty compensation

---

12/ cont.

with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. (emphasis added).



would tend to be reduced, for no countervailing bargaining right would be available. The effect could only further exacerbate the faculty's economic distress.

More important, the mere availability of bargaining under the Act has been a consideration in many an administration's assessment of alternative courses of dealing with its faculty. As a leading study reports, "Just the possibility of unionization may be enough to force administrations to pay more attention to faculty senates and committees." F. Kemerer & J. Baldrige, UNIONS ON CAMPUS 210 (1975)(emphasis in original). Note, for example, the explanation by the labor counsel at Yeshiva University and former Associate Director of Labor Relations for New York University of how N.Y.U. campaigned in the representation election:

Advantageous conditions already achieved by the faculty in terms of economics, status, and governance authority were described by the administration. This was aimed to suggest [to the faculty] a continuing concern on the part of the University for faculty interests and, within permissible legal limits, offered a basis for expectation of even more substantial improvements based on the record of performance in recent years. Bodner, The "No Agent" Vote at N.Y.U.: A Concise Legal History, ACBIS Special Report #9 (1974) at 16. (emphasis added).

To similar effect see Reiss, Collegiality or Unionization: The Fordham Election, in THE EFFECTS OF FACULTY COLLECTIVE BARGAINING ON HIGHER EDUCATION 37 (R. Hewitt, 1973)<sup>14/</sup> and Lussier, Albion College Votes "No Agent:" A Case

---

<sup>14/</sup> Fordham University's Academic Vice President explained:

Just prior to the filing of the petition . . . [for an NLRB election], a draft of a new set of University statutes was submitted by the administration to the Faculty Senate for its consideration. The proposed statutes incorporated most of the AAUP recommended policies and procedures on faculty matters, establishing clear

(continued)

Study, ACBIS Special Report #7 (undated) at 7.

Acceptance of Yeshiva's argument (identical to the earlier arguments made by the administrations of Fordham University and New York University) would eliminate an incentive for administrations to be more sensitive to faculty concerns; in fact, given the modest growth of collective bargaining, it may be that that sensitizing effect is the most significant impact the Act has had upon private colleges and universities. It cannot be said that the removal of an effective incentive to good faculty-administration relations is desirable.

---

14/ cont.

procedures for faculty involvement in decisions at every level, grievance machinery, and a faculty salary and benefits committee to negotiate with the administration. The provisions of the statute were negotiated between the administration and the Faculty Senate during the year and, following approval by the Senate, were adopted on July 1, 1971 by the Board of Trustees.

The university was also beginning to come out of the most severe phase of its financial crisis, allowing a significant improvement in faculty salaries (which was announced by the President in the fall of 1970) with further improvement to be negotiated with the new faculty salaries and benefits committee.

By the fall of 1971, then, the stage had been set for a discussion of the issues. The overall question for the faculty was whether to opt for collective bargaining, with representation by the AAUP chapter, or to opt for the collegial form of faculty involvement, as specified in the new University statutes. Neither pattern had previously been fully in effect at Fordham. There was obviously a risk either way. For some faculty, the question was posed: Can the new statutes actually guarantee faculty rights, grievance procedures, participation in decision-making, including negotiations on salaries, all in accordance with AAUP recommended principles and procedures? If they can, does the faculty still need a collective bargaining agent? Reiss, Collegiality or Unionization: The Fordham Election, supra at 39 (emphasis added).



D. There Is No Necessary Inconsistency Between Collective  
Bargaining and Faculty Governance

Once a bargaining relationship has been established, the parties will have to reconcile the role of faculty qua faculty with that of the bargaining agency qua bargaining agent. This is a genuine and subtle problem. But it is simply not accurate to assert that collective bargaining is necessarily inconsistent with the faculty's role in educational decision-making. See, e.g., Bloustein, A Chamber of Horrors?, in THE EFFECTS OF FACULTY COLLECTIVE BARGAINING ON HIGHER EDUCATION 110 (R. Hewitt ed. 1973)<sup>15/</sup>

---

<sup>15/</sup> President Bloustein, a former professor of law, reflected on his experience as President of Bennington College (not unionized) and Rutgers University (unionized).

The chamber of horrors we are told we will enter during a period of unionization turns out to be just the room we have been living in without unionization.

Bloustein, A Chamber of Horrors?, supra at 110. He then reviews each of the "horrors" that allegedly will result from bargaining -- none of which has been realized at Rutgers. He concludes with an especially pregnant passage that flows from an analysis similar to that supplied in the Introductory:

Under such circumstances, we have only two alternatives: We either make agreements with each individual in a faculty or we make an agreement which will cover them all, with an organized group of faculty who represent that faculty in their common interests. When I think of my attempts to reach individual agreements at Bennington, with a faculty of 65, and compare that with my attempts to reach an agreement at Rutgers University, with a faculty of 2500, I much prefer the Rutgers situation. It gives me a group of faculty with whom I can sit down knowing they speak as well as any individual or group can for the interest of the entire faculty.

There is, of course, a seeming conflict of role between a group of people who want to, on the one hand, share governance with the administration and on the other hand, bargain against it. There is also a seeming conflict of role between a group of faculty which acts as agent or delegee of the governing body in determining academic policy, while also making claims against that governing body in terms of the other perquisites of academic life.

(continued)

Commonly, the bargaining agent will negotiate economic matters and the substance of the faculty's role in governance. See F. Kemerer & J. Baldridge, UNIONS ON CAMPUS 210-212 (1975). Note, for example, the following provisions from a recent collective agreement at Bloomfield College (New Jersey):

Art. III - College Governance

1. Principles

The Corporation and the Chapter accept the principles of college governance which are enunciated in the 1966 Statement on Governance of Colleges and Universities formulated by the American Association of University Professors, the American Council on Education, and the Association of Governing Boards of Universities and Colleges.

2. By-Laws and Standing Rules

Both parties recognize and accept the By-Laws and Standing Rules of the Bloomfield College Faculty as the basic governance documents of the Faculty and include them as Appendices A and B of this Agreement. If either party to this Agreement objects to a proposed change in these documents, such change shall not be implemented except after good faith negotiation between the parties. Whenever these By-Laws and Standing Rules may be in conflict with the provisions of this Agreement, this Agreement shall be controlling.

\* \* \* \*

4. Committees

The members of all standing and special committees of the Faculty shall be either elected directly by the Faculty or appointed by the Faculty Council. Committee appointments for the new academic year shall be made by the newly-elected Faculty Council. No new standing or special Faculty committee shall be established except by legislative action of the Faculty. Agreement Between Bloomfield College and the Bloomfield College Chapter of AAUP (1975-1977).

---

15/ cont.

However, in my experience, the contradictory nature of those roles is a theoretical possibility, rather than a fact. Id. at 115 (emphasis in original).



Or the rather more elaborate provisions of a recent collective agreement at St. John's University (New York):

§2.4 a. The parties hereby incorporate into this Agreement Part V of the 1966 Statement insofar as it is applicable to the University and to the extent set forth below.

The faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process. Faculty status includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure and dismissal. The primary responsibility of the faculty for such matters is based upon the fact that its judgment is central to general educational policy. Furthermore, scholars in a particular field or activity have the chief competence for judging the work of their colleagues; in such competence it is implicit that responsibility exists for both adverse and favorable judgments. Likewise there is the more general competence of experienced faculty personnel committees having a broader charge.

Determinations in these matters should first be by faculty action through established procedures, reviewed by the chief academic officers with the concurrence of the Board of Trustees. On these matters the power of review or final decision is lodged in the governing board or delegated by it to the President. The decision shall ordinarily concur with faculty determinations expressed through the appropriate University bodies or agencies in those areas, referred to above, where the faculty has primary responsibility, except in rare circumstances and for compelling reasons. The reasons for the failure to concur shall be communicated to the faculty. The faculty, following such communication of failure to concur, shall have the opportunity for further consideration and further transmittal of its views to the President or to the Board of Trustees. Budgets, manpower limitations, the time element and the policies of other groups, bodies and agencies having jurisdiction over the institution may set limits to realization of faculty advice.

When educational policies have been established by the Board of Trustees, after such consultations and/or discussions as may be required in the Statutes or in

this Agreement, it becomes the responsibility primarily of the faculty to determine appropriate curriculum and procedures of student instruction. The faculty sets the requirements for the degrees offered in course, determines when the requirements have been met, and recommends to the President and Board that the degrees thus achieved be granted.

Agencies for faculty participation in the government of the University have been established by the Statutes and by this Agreement at each level where faculty responsibility is present. The structure and procedures for faculty participation shall be established, modified or abridged only by joint action of the components of the institution. Faculty representatives shall be selected by the faculty, according to procedures determined by the faculty.

b. The AAUP-FA and the Administration, by the provisions of Section 2.4(a) hereof and by the incorporation of the Statutes into this Agreement, have recognized and continue to recognize the desirability of generally resting final authority in the Administration, as specified therein. To these ends, the parties agree that all the rights, powers and authority of the Administration which have not been abridged or modified by this Agreement are retained by the Administration. The existence and right to exercise such powers and authority shall not be subject to the grievance-arbitration procedures set forth in this Agreement, but any claim of arbitrary, unreasonable or discriminatory exercise of such powers and authority relating to the terms and conditions of employment shall be subject to such grievance-arbitration procedures.

§2.5 The presently constituted organizations within the University (e.g., the University Senate, Faculty Councils, Departmental Personnel and Budget Committees, etc.) or any other or similar body composed in whole or in part of the faculty, shall continue to function at the University, provided that the actions thereof may not directly or indirectly repeal, rescind or otherwise modify the terms and conditions of this Agreement. Agreement between the Administration of St. John's University and the St. John's Chapter of the AAUP-FA (1974-1977).<sup>16/</sup>

---

<sup>16/</sup> The collective bargaining relationship was established at St. John's University in 1970 under New York State's labor act, prior to the Board's decision to extend jurisdiction. Thus it represents one of the oldest bargaining relationships in the private sector. Accordingly, it is important to note that this collegial approach to governance, taken in the first collective agreement, has survived the test of time.



Other examples -- some relatively simple, like Bloomfield, some far more elaborate than St. John's -- could be cited.

These agreements preserve and strengthen an independent faculty role in educational decision-making. Although collective bargaining contracts doubtless exist that bargain away faculty governance or that subsume the substance of educational decision-making as part of the collective bargaining process, it simply cannot be said in the face of existing empirical evidence that such results are inevitable or that there is a necessary conflict between bargaining and governance. The authentic question presented is how the Board and Courts of Appeals may advance or hinder the achievement of an educationally sound reconciliation between bargaining and governance. Section II, infra, will show that the single most critical determination lies in the configuration of an appropriate bargaining unit.

II. THE IMPERATIVE CONDITION FOR A SATISFACTORY ACCOMMODATION OF COLLECTIVE BARGAINING AND FACULTY GOVERNANCE IS THE DETERMINATION OF A BARGAINING UNIT CONGRUENT WITH THE CORE FACULTY

Once the Act applies to college and university faculty, the genuine (and subtle) problem lies in achieving a satisfactory accommodation of bargaining with the faculty's role in governance. Section I(D), supra. While the solution is primarily for the parties to work out for themselves, the Board and, upon review, the Courts of Appeals can either facilitate or hinder a sound reconciliation. The key lies in the governmental function of defining the appropriate bargaining unit. As the Carnegie Council puts it, "The underlying principle is that . . . administrative rulings [in unit determination] should respect and carefully protect the tradition of faculty self-determination in matters of academic organization and management." Report of the Carnegie Council on Policy Studies in Higher Education, supra at 11. The Council identified this principle as an "'imperative' condition." Id. at 12. The Board has acknowledged its responsibility<sup>17</sup> and has substantially taken the Carnegie Council's approach.

The AAUP submits that this imperative condition constitutes both a principled ground for decision and the sine qua non for the successful adaptation of collective bargaining to the academic world. The reason is simply that bargaining, even if limited solely to purely economic matters, will have a substantial impact upon educational decisions. Bargaining over salary levels, research funds, and work loads will have a significant (and, sometimes, determinative) effect upon curriculum, class size and research,

---

<sup>17</sup>/ "We should not endanger the potential contribution which collective bargaining may provide in coping with the serious problems confronting our colleges and universities by improper unit determination." New York University, 205 NLRB 4, 7 (1973).



and so, upon educational quality. Moreover, as Section I(D), supra, pointed out, what may be at stake in bargaining is the very future of the system of governance itself. Accordingly, it is essential that those who are not considered by the core faculty to share its commitment to the institution as a professional career not be injected into the constituency for bargaining by the wooden application of industrial precedents. For the same reason, faculty members who are looked upon by their colleagues as their natural leaders, whose experience and judgment might be especially valued, should not be removed from the bargaining constituency. Only in this way will the total educational impact of the bargain struck reflect the undiluted and undiminished assessment of the core faculty.

The instant case implicates this imperative condition on three questions -- the status of department chairmen, part-time faculty, and "terminal" faculty.

A. Department Chairman Are Not Statutory Supervisors Where They Act Primarily in the Interest of Their Colleagues in the Department

In order to deal with the status of department chairmen under the Act, it is necessary to understand the academic department. An academic department is not an administrative construct, serving the ends of efficient management; in fact, the department is more often thought of by administrators as an obstacle to efficiency. "The department," as a leading study puts it, "is the professor writ large." L. Epstein, GOVERNING THE UNIVERSITY 126 (1974). He explains:

Much more clearly than at any higher level in a university, the professor's judgments in departmental decision making are specialized ones derived from his scholarly work. They cannot be challenged on academic

grounds by administrators or by any other officials outside the specialized area. Just as the individual professor has established his power to decide what he ought to teach or study, on the grounds of his professional competence, so the department asserts the similar power for its professors to make collegial decisions within an academic field. In practice, this professional competence constitutes the case for departmental autonomy within a university -- that is, for specialized groups of professors to have a governing sphere of their own. As a defender of the autonomous department has said, it "is a shield for its members, a strong line of defense against the academic man doing other than what he wants to do." Id. (reference omitted).

To similar effect see H. Mason, COLLEGE AND UNIVERSITY GOVERNMENT, supra at 77-81 ("The Department-Core Unit of the Faculty").

Accordingly, the chairmanship represents that critical intersection -- where the professional influence of the faculty meets the institution's managerial hierarchy. In some institutions, chairmen (sometimes called "heads") are agents of the administration, acting in its interests; but in a great many, the chairman is the leader of a disciplinary peer group, acting for it and protecting its interests from the administration. As Epstein explains:

Although technically an administrative appointee, most often by a college dean, the chairman is really the choice of his departmental colleagues, who express their preference either informally or through actual ballot. He may become an effective leader, if his colleagues want him to be, but he is not expected to make any important policies without the consent of at least a majority of his colleagues. Much of the time the chairmanship is viewed as a chore carrying some but not great status, and in many large and important departments it is held for about three or four years by one professor and then passed along to someone else. It is almost never a full-time administrative job, but rather a part-time encumbrance for a professor who is pursuing a professional career. In most instances, the chairman is not the department's most famous professor. He may even be one of the least famous. The important point is that he should represent the department in dealing with the university administration. . . . L. Epstein, GOVERNING THE UNIVERSITY 131 (1974) (reference omitted) (emphasis added).



The NLRB has had considerable experience with department chairman. It has explored the most minute details of their role in institutional decision-making in the lengthy records compiled in a number of cases; it has heard expert testimony and considered leading studies of academic government.<sup>18/</sup> As a result, the Board's approach that emerges from its decisional law has been shaped by an acute awareness of the special nature of the academic department and of the impact upon the faculty of exempting their leaders from the bargaining unit. That approach has been accurately summarized:

[I]f the departmental chairmen are no more than first among equals, selected by their colleagues to represent the faculty interests in negotiations with the administration, the NLRB holds them to be properly included within the faculty bargaining unit. On the other hand, if they are appointed by the administration to supervise the department as the administration sees best, then they are excluded from the faculty bargaining unit. When they are neither completely one nor the other, a balancing process takes place to determine whether their interests are closer to those of the faculty or the administration. Pollitt & Thompson, Collective Bargaining on the Campus: A Survey Five Years After Cornell, 1 Indus. Rel. L.J. 191, 231 (1976)

<sup>18/</sup> In Fordham University, 193 NLRB 134 (1971), Professor Clyde Summers testified as an expert witness about the conduct of college and university government and its relationship to the Act. In New York University, 205 NLRB 4 (1973), the administration introduced a leading study of university government based upon research into decision-making at N.Y.U., J. Baldrige, POWER AND CONFLICT IN THE UNIVERSITY (1971). Professor Baldrige, then of Stanford University, was later called as an expert witness. He testified that the department chairman is,

[A] representative of the faculty to the administration.

He becomes a conduit of influence by which the faculty as a professional group tries to make its professional concerns known to the administration.

So, while he does have a dual role, there's no question about that. It is not simply black and white. I think the predominant feeling, the predominant set of activities, the predominant identity that the department chairman has is with his faculty.

If you have to choose between employer-employee, faculty-administration, he comes down on the side of the faculty primarily.

Q You have spoken to the question of the chairman's identification at New York University based on your research. What about the faculty's identification, how do they look upon the chairman?



The Board's approach rests upon the imperative condition of defining the bargaining unit as coextensive with the core faculty and is fully consistent with the Act. As Section IA, supra, made clear, Congress delegated to the Board the difficult task of reconciling the exemption of supervisors with the specific inclusion of professionals, albeit in presumptively separate bargaining units. Moreover, Congress defined professionals in such a way as to include senior leaders of professional work groups. Id. Accordingly, even in industrial and commercial employment, where authority is clearly conferred by management and the group leader is accountable to management for the group's performance, the Board has had to determine whether the work of the team leader was essentially supervisory or professional in nature, even though the leader's authority would otherwise seem to fall under one or another of the criteria of supervisory status in section 2(11). See e.g., General Dynamics Corp., 213 NLRB 851 (1974) (research project leaders and program managers), Skidmore, Owings & Merrill, 192 NLRB 920 (1971) (architects). Cf. Post-Newsweek Station, 203 NLRB 522 (1973) (news editors), quoted with approval by this Court in Westinghouse Broadcasting Co. v. NLRB, 503 F.2d 1055 (2nd Cir. 1974). A similar approach

---

18/ cont.

A I think it is clear . . . that most faculty look upon their chairman as their man. They look upon the chairman as their man who represents them to the big bad administration out there. They look upon the chairman as their sort of negotiating agent, a good way to phrase it. He is a man that takes the particular disciplinary concerns of the department and tries to translate them to the larger university and, as such, the faculty identifies him as their representative, not the administration's representative by and large. New York University, supra, transcript at 1124-1126.



has been taken with respect to the leaders of nursing teams. See, e.g., Trustees of Noble Hospital, 218 NLRB 1441 (1975) (head nurses), and the cases cited in Finkin, The Supervisory Status of Professional Employees, supra note 89 at 824-25.

It follows a fortiori that where an academic department chairman functions primarily on behalf of his colleagues in representing their views to the administration or in exercising independent judgment over the department's affairs, he fails to meet the "interest of the employer" requirement of section 2(11) and therefore should not be deemed a statutory supervisor. The consequences of failing to perceive this distinction were drawn by Professor Clyde Summers in his testimony in Fordham University:

If you take a school in which the department chairmen have really been . . . the voices of the members of their department in dealing with the administration and you take them out of the bargaining unit, you call them "supervisors" . . . you will change the whole internal structure of the university. They will no longer be part of this faculty and . . . you will really convert them into supervisors by these designations.

Fordham University, 193 NLRB 134 (1971), Transcript at 791.

To similar effect see R. Carr & D. Van Eyck, COLLECTIVE BARGAINING COMES TO THE CAMPUS 114 (1973) and F. Kemerer & J. Baldridge, UNIONS ON CAMPUS 185 (1975) ("Eliminating chairpersons from the bargaining unit has obvious consequences for shared governance: influential faculty leaders would be on the opposite side of the managerial fence from their colleagues, and peer decision making in the departments would undoubtedly be affected.") It is for this reason that the Carnegie Commission urged the inclusion of department chairmen in faculty units. GOVERNANCE OF HIGHER EDUCATION, supra at 49.

B. Part-Time Teachers Ineligible for Academic Tenure Are Appropriately Excluded

Prior to New York University, 205 NLRB 4 (1973), the Board had applied industrial precedent and included "regular" part-time faculty in bargaining units with the full-time faculty. The Board proceeded upon the assumption that a part-timer who teaches one course is doing half the work of a full-timer who teaches two courses and, therefore, there is a community of interest between them. In so doing, the Board had ignored substantial differences not only in terms and conditions of employment but in the very nature of the commitment made to the institution. Part-timers are not customarily considered by the core faculty to be one of them; thus the inclusion of part-timers had the potential of diluting significantly the voice of the core faculty. Moreover, because the assumption was in error the Board found it increasingly impossible to distinguish the "regular" part-timer from the merely casual or temporary employee for the purpose of determining voting eligibility.

To its credit, the Board consolidated three cases for oral argument to reconsider its policy. The Board concluded, on the basis of that comprehensive review, that "all adjunct and part-time faculty members who are not employed in 'tenure track' [tenure eligible] positions" should be excluded. New York University, supra at 6. The policy is well within the permissible ambit of Board discretion.

It should be noted that the status of part-timers is a significant issue only in urban institutions where there is a substantial pool of inexpensive academic labor in the surrounding community. In some institutions, the use of part-timers is such that they may actually outnumber the full-time



faculty in any one semester. In such cases, the core faculty might find itself looking to the administration rather than to a representative of their own choosing for protection.<sup>19/</sup>

Nevertheless, the administration of Yeshiva University has urged inclusion of "regular half-time" faculty by arguing that they conform to the criteria the Board considered in New York University as differentiating the adjunct from the full-time faculty, except the one criterion that the Board made the test of unit inclusion -- eligibility for academic tenure. Were the Board commanded to determine the most appropriate bargaining unit, the administration's argument might raise a significant issue. But the Board is commanded to determine only that the unit is an appropriate one, not necessarily the most appropriate, and in performing its function the Board may establish standards appropriate to the statutory purpose.

It cannot be said that the limitation of unit inclusion solely to those part-timers which the institution had chosen to make tenure eligible produces an inappropriate unit. The status of part-timers in the academic

---

<sup>19/</sup> This fact had to be dealt with by the American Federation of Teachers (AFT) in arguing for the inclusion of "regular" part-timers:

The mere fact that the part-timers outnumber the full-timers does not mitigate the ability of the union to represent it or mitigate the ability of the Board to see that they represent the interests of the minority [i.e. the core faculty].

The Board has time and again seen to that. I think it would be unfair to say that the minority would not be properly represented. The university itself would see that the full-time professors are properly represented. (emphasis added)

Remarks of Mr. Parsonnet in Transcript of Oral Argument, New York University, Fairleigh-Dickinson University, The Catholic University of America quoted in Finkin, The NLRB in Higher Education, supra at 628.

community was addressed in the report of the National Commission on Academic Tenure in Higher Education:

Part-Time Service. It has long been standard practice to restrict eligibility for tenure to those appointed to full-time service in the institution and to count only full-time service toward the fulfillment of the institution's probationary requirement. This practice derives fundamentally from the theory of the profession -- that only the regular faculty, by virtue of their full commitment to professional service in an institution, can make a valid claim to the unique privileges and responsibilities associated with academic tenure. Part-time service has always been more or less impromptu and ad hoc, related more to temporary or emergency needs, or to the desire to provide apprentice training to graduate students, than to permanent institutional requirements or long-term individual interests. To be sure, part-time service by practicing professionals has always characterized professional schools -- notably, medicine, architecture, and law; but special arrangements have grown up to handle such arrangements, designed to assure appropriate recognition and participation for the part-time faculty while at the same time according fundamental responsibility to those who have made a complete commitment to the institution and to academic life.

FACULTY TENURE: A REPORT AND RECOMMENDATIONS OF THE NATIONAL COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION 70-79 (1973) (emphasis added) (heading in original).

The Commission noted that, largely in response to the demands of female academics who wish to develop their professional careers during child-bearing years, some institutions (e.g., Princeton, Columbia and Wesleyan Universities) have begun to modify their tenure policies to allow some part-time positions to be placed on the tenure "track." It commended these efforts subject, however, to several conditions, not the least of which was the assurance that the criteria for the award of tenure would be uniform for all appointees in a given discipline.

The Board's approach is fully consistent with the status of part-timers in the academic world and so conforms to the imperative condition



that the bargaining unit be congruent with the core faculty. In institutions where some part-timers have been identified by the faculty as being sufficiently committed to professional service in the institution as a career to warrant being placed on the tenure track, they would be included by the Board in a unit with their true colleagues. Otherwise they would be excluded.

The Board's approach also serves the important goal of sound administration. Administrative agencies have long been called upon to better define their standards. Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards, 75 Harv. L. Rev. 863, 1055, 1263 (1962). Judge Friendly's analysis fully applies to the proper function of a Court of Appeals in confronting a rule-like refinement of the Act that clarifies the Board's standard of unit determination. As an eminent labor law scholar put it:

The Board needs to be encouraged [by the Courts of Appeals] to take in hand specific areas productive of heavy litigation and ripe for the task, and to attempt to lay down tolerably clear and workable crystallizations of principle by which the run of litigation may be tested without beginning anew in each case with nothing but a bewildering cross-current of "precedent" to which one can resort. . . .  
Lesnick, The Labor Board and the Courts of Appeals: A Crisis of Confidence, Proceedings of the New York University Twenty-First Annual Conference on Labor 35, 40 (1969).

Under New York University, supra, administrations and faculty can readily determine the status of part-timers without protracted (and costly) litigation. The Board's approach avoids the inevitable litigation to determine in each future case just how much teaching and with what periodicity is sufficient to add what group of tenure ineligible part-timers to the core faculty; that is, just the thicket the Board had departed and that Yeshiva

invited the Board to re-enter.<sup>20/</sup> The Board's approach avoids all the pitfalls to consistent administration that bedeviled the Board (and the parties to contested cases) prior to New York University, and is fully responsive to the academic milieu.

---

<sup>20/</sup> In New York University the AAUP suggested that the Board consider adopting a set of flexible criteria, including but not limited to tenure eligibility. A reason for arguing for more flexible standards was the local AAUP affiliate's desire to include a unique category of part-timers -- the "half-time status" clinical dental faculty -- who were not tenure eligible. See generally a precis of that argument in Finkin, The NLRB in Higher Education, *supra* n. 81 at 631-632.

The suggestion of the Yeshiva administration that the term "regular half-time" faculty presented here is like that presented by the AAUP in New York University is mistaken. Employer's Post Hearing Brief at 114. The term in New York University was an explicit institutional usage limited solely to a few dental clinical faculty, developed from institutional usage governing full-time faculty on partially released time. Yeshiva's Post Hearing Brief to the Board did not suggest that its proposed test for voting eligibility -- part-timers teaching six or more hours in the semester in which the election is held and in both semesters of the three previous academic years -- reflected any differential institutional treatment of part-timers meeting these criteria as opposed to any part-timer simply teaching six hours. The Employer's Post Hearing Brief thus argues for an artificially constructed standard of voter eligibility, not acceptance of an institutional usage.

Moreover, had the Board accepted the AAUP's view in New York University, it would then have had to consider to what extent Yeshiva's part-timers are "like" the N.Y.U. Dental School's rather more specially situated part-timers, Finkin, The NLRB in Higher Education, *supra* n. 81 at 631-32. It is not at all clear from the record in the instant case that had the AAUP's argument prevailed, the instant part-timers would properly be includable in a full-time faculty bargaining unit. Suffice it to say, the Board took the more workable approach by adopting a rule that is at once responsive to the imperative condition for unit determination and declines the invitation to such persistent (and often dilatory) litigation over the status of part-timers.



C. "Terminal" Faculty Are Appropriately Included

The University administration sought to deny voting eligibility to "terminal" faculty members, that is, those faculty who have been given notice of nonrenewal of probationary appointments, who have notified the University that they intend to resign, or who will have reached the mandatory retirement age by the close of the academic year in which the election is held. These faculty members will not return to the University and so, it is claimed, they should not participate in a decision in which their interests are essentially short-term<sup>21/</sup> but that may affect the on-going life of the institution well after their departure. Employer's Post Hearing Brief at 108.

The argument ignores the fact that until the appointment actually terminates the "terminal" faculty member continues to enjoy all the rights and privileges of a professorial appointment. It would be a different, indeed dispositive argument if, under the institution's regulations, faculty status ceased upon notice of nonrenewal or intent to resign. But that is not the case. "Terminal" faculty continue to enjoy academic freedom, teach their classes, conduct their research, vote in their departments, serve on committees, pass upon faculty status decisions, and otherwise carry out the

---

<sup>21/</sup> This approach encounters some difficulty with respect to the impending retiree. Inasmuch as his departure is known well in advance, just how close to the retirement age must he come before the Board should determine him ineligible to vote? Inasmuch as the achievement of a first collective agreement may take a year or more after the election (or longer where the Employer refuses to bargain) a rule geared to when voters might rationally be affected by collective bargaining would encounter some practical problems.

functions of a full-time member of the faculty. They will, it is true, not endure the later dislocations of a poorly devised curriculum or the dis-appointments of an unwise tenure decision. Yet the university (and their colleagues) allow them to participate in revising the curriculum or to pass upon appointment, tenure or promotion; it would be anomalous for the Board to disallow their vote in a representative election.

In sum, the "imperative" condition, discussed at the outset, is fully applicable here. Where an institution and its faculty continue to view "terminal" faculty as full-fledged faculty members, there is no reason to separate them from their colleagues solely for the purpose of voting in a representation election. In fact, "terminal" faculty may -- by virtue of their years of experience in the institution -- know a good deal more of the administration's predispositions (and of the quality of faculty union leadership) and might therefore be in a better position to cast a fully informed ballot than would a relative newcomer to the faculty whose right to vote is not in dispute.



CONCLUSION

For the foregoing reasons, the Board's order in the instant case should be enforced.

Respectfully submitted,

Matthew W. Finkin

CERTIFICATE OF SERVICE

I hereby certify that four copies of the Motion by the American Association of University Professor for Leave to File Brief Amicus Curiae in National Labor Relations Board and Yeshiva University Faculty Association v. Yeshiva University were mailed on this 6th day of February, 1978, to:

Clerk  
U.S. Court of Appeals  
U.S. Courthouse - Room 1702  
Foley Square  
New York, N.Y. 10007

and one copy of the said Motion was mailed this day to the following:

Saul Kramer, Esq.  
Proskauer, Rose, Goetz & Mendelsohn  
300 Park Avenue  
New York, N.Y. 10022

Elliott Moore, Esq.  
Deputy Associate General Counsel  
Division of Enforcement Litigation  
National Labor Relations Board  
1717 Pennsylvania Avenue, N.W.  
Washington, D.C. 20570

Ronald H. Shechtman, Esq.  
Gordon & Shechtman, P.C.  
666 Third Avenue  
New York, N. Y. 10017

*David M. Rabban*

David M. Rabban  
American Association of  
University Professors  
One Dupont Circle  
Washington, D.C. 20036



AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

ONE DUPONT CIRCLE - SUITE 500

WASHINGTON, D.C. 20036

Telephone 202-466-8050

*President*

PETER O. STEINER  
University of Michigan

*General Secretary*

MORTON S. BARATZ  
Washington Office

*Associate Secretary  
and Associate Counsel*  
DAVID M. RABBAN

February 6, 1978

Clerk  
U.S. Court of Appeals  
U.S. Courthouse - Room 1702  
Foley Square  
New York, N. Y. 10007

Re: National Labor Relations Board and Yeshiva University  
Faculty Association v. Yeshiva University  
No. 77-4182

Dear Sir:

Enclosed please find a Motion by the American Association of University Professors for Leave to File Brief Amicus Curiae and a Certificate of Service for the Motion. Enclosed please also find ten (10) copies of the Brief, together with a Certificate of Service for the Brief.

Sincerely yours,

*David M. Rabban*

David M. Rabban

CERTIFICATE OF SERVICE

I hereby certify that ten copies of the Brief Amicus Curiae of the American Association of University Professors in National Labor Relations Board and Yeshiva University Faculty Association v. Yeshiva University were mailed on this 6th day of February, 1978, to:

Clerk  
U.S. Court of Appeals  
U.S. Courthouse - Room 1702  
Foley Square  
New York, N. Y. 10007

and two copies of this Brief were mailed today to:

Saul Kramer, Esq.  
Proskauer, Rose, Goetz & Mendelsohn  
300 Park Avenue  
New York, N.Y. 10022

Elliott Moore, Esq.  
Deputy Associate General Counsel  
Division of Enforcement Litigation  
National Labor Relations Board  
1717 Pennsylvania Avenue, N.W.  
Washington, D.C. 20570

Ronald H. Shechtman, Esq.  
Gordon & Shechtman, P.C.  
666 Third Avenue  
New York, N. . 10017

David M. Rabban

David M. Rabban  
American Association of  
University Professors  
One Dupont Circle  
Washington, D.C. 20036